IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ **OMP No.279/2004**

% **Date of Decision : October 09, 2007**

#COGENT VENTURES (INDIA) LTD.

PETITIONER

! Through: Mr.Chetan Sharma, Sr. Advocate with Mr.Sushil K.Tekriwal, Advocates

Versus

$S.K. MARWAH **RESPONDENT**

^ Through: Mr.A.K.Singla, Sr.Advocate with Mr.Pankaj Gupta & Ms.Promila Dhar, Advocates.

AND

Arb. P No.67/2005

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CORAM:-
*** HON'BLE MR. JUSTICE S.N. AGGARWAL**

1. Whether reporters of Local paper may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether the judgment should be reported in the Digest?

S.N. AGGARWAL, J.

These are two petitions filed by the petitioner against the respondent. One is under Section 9 and the other is under Section 11(6) of the Arbitration and Conciliation Act, 1996. Both these petitions are proposed to be decided by this common judgment because question of facts and law involved in them are identical.

2 The factual matrix of the case giving rise to these petitions is as follows:-

The petitioner is a company incorporated under the Companies Act, 1956. Mr. Santosh Kumar is the Chairman and Director of the said company. In November, 2003, the respondent agreed to sell his agricultural land bearing Khasra No. 811, House No. 4, known as ESSEL MINI FARM measuring 1029 sq. yds. situated at Village Chattarpur, Tehsil Mehrauli, New Delhi at a rate of Rs. 5251.00 per sq. yds. for a total consideration of Rs. 54,03,279.00 to Mr. Santosh Kumar. An amount of Rs. 5,40,000/- received by the respondent under the Agreement signed by the respondent with said Mr. Santosh

Kumar of the petitioner company on 10.11.2003 vide cheque No. 707240 dated 08.11.2003 drawn on Indian Overseas Bank, Yusuf Sarai Branch, New Delhi. Under the Agreement the vendee Mr. Santosh Kumar was required to pay the balance sale consideration of Rs. 48,62,279.00 by 15.02.2004 as stipulated in the said Agreement. Because of alleged breach on the part of the vendee in not pursuing the transaction any further, the respondent being the vendor returned the deposit of Rs. 5,40,000.00 received by him as earnest money from the vendee and this amount was returned vide Cheque No. 957850 dated 18.08.2004 sent to the vendee vide covering letter dated 16/18.08.2004 (Annexure 'A' to the respondent's application under Section 151 CPC being IA No. 6514/2004 in OMP No. 279/2004). At this point of time, disputes and differences arose between the parties under the Agreement to Sell dated 10.11.2003. The said Agreement to Sell contained an Arbitration Clause being Clause No. 10 whereby the parties had agreed to get their disputes under the Agreement resolved by a panel of Arbitrators, one to be appointed by each one of them. Arbitration was to be governed by the provisions of Indian Arbitration and Conciliation Act, 1996. The Clause 10 of the Agreement read as under:-

> *"That in the event of any dispute arising between the parties with regard to the applicability of interpretation of any of the terms and conditions of this MOU, then such dispute would be resolved by way of arbitration. Both the parties shall have the right to appoint one Arbitrator each. And the award given by these two Arbitrator shall be binding on both the parties. Such arbitration shall be governed by the provisions of Indian Arbitration and Conciliation Act, 1996. The courts at Delhi shall have the jurisdiction in the event of any dispute."*

3 On or around 23.08.2004, the petitioner filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 for ad interim injunction restraining the respondent from alienating or creating any third party right/charge in the subject property agreed to be sold vide above referred Agreement to Sell dated 10.11.2003. This Court vide its interim order passed on 31.08.2004 in OMP No. 279/2004 restrained the respondent from selling, disposing of or transferring the suit property in favour of any third person subject to the petitioner's depositing the balance sale consideration in the Court within two weeks. This interim order was modified vide order dated 25.10.2004 to the extent that subject to the petitioner's depositing a sum of Rs. 25 lacs in the Court within two weeks, the respondent would stand restrained from selling, disposing of or transferring the suit property in favour of any third person. This amount of Rs. 25 lacs was not deposited by the petitioner

within the stipulated time period of two weeks mentioned in the order dated 25.10.2004. The time for depositing the said amount was extended till 16.11.2004 without prejudice to the rights of the parties vide order passed on 08.11.2004. In compliance of the aforementioned orders, the petitioner deposited a cheque of Rs. 25 lacs with the Court on 15.11.2004. However, the said cheque deposited by the petitioner in the Court was received back unpaid from the Reserve Bank of India with the objection 'Funds insufficient' and a report in this regard was made by the Registry to the Court which was taken on record vide order dated 19.01.2005. Thereafter the proceedings in OMP No. 279/2004 under Section 9 of the Arbitration and Conciliation Act, 1996 continued to be adjourned from time to time till the matter was finally heard along with the connected petition under Section 11 (6) of the said Act on 03.10.2007.

4 On or around 11.03.2005, the petitioner filed the connected petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of Arbitrator in terms of Arbitration Agreement contained in the Agreement to Sell dated 10.11.2003 referred above. The plea of the petitioner in the said petition is that the disputes and differences have

arisen between the parties and the same are required to be resolved through arbitration by the Arbitrator to be appointed by the Court since the respondent had failed to comply with the notice dated 16.08.2004 allegedly sent by the petitioner to the respondent invoking the Arbitration Agreement.

5 The respondent has filed his reply to both these petitions. His defence is that the petitioner has no locus-standi to file the said petitions because the respondent did not make any Agreement to Sell or Arbitration Agreement with the petitioner. According to the respondent the Agreement to Sell dated 10.11.2003 was with the respondent described as 'vendor' and Mr. Santosh Kumar described as 'vendee'. The respondent has further contended in his reply that he did not receive the notice dated 16.08.2004 described as notice under Section 11(6) of the Arbitration and Conciliation Act, 1996. According to the respondent, the petitioner has fabricated the said notice and he has intentionally not filed any document or record to prove the dispatch or delivery of the said notice to the respondent. Furthermore, the respondent has contended that since the petitioner had committed breach of contract of Agreement to Sell dated 10.11.2003, the respondent had returned the advance of Rs. 5,40,000/- received by him from the petitioner

and with the refund of the advance/earnest money the transaction under the Agreement to Sell has come to an end. According to the respondent, no arbitrable dispute is left between the parties as the transaction has come to an end and therefore the respondent has prayed for dismissal of both these petitions.

6 I have heard the learned counsel for both the parties and have also perused the entire record including the documents referred by the counsel for the parties during their arguments.

7 The thrust of arguments of Mr. Singla, learned senior counsel appearing on behalf of the respondent was that no arbitrable dispute is left between the parties to be decided by the Arbitrator. It was further argued by him that the petition under Section 11(6) is even otherwise liable to be dismissed because the notice invoking the Arbitration Agreement was never served by the petitioner upon the respondent before filing of the said petition. Mr Singla has contended that the notice dated 16.08.2004 relied upon by the petitioner in his petition under Section 11(6) is a fabricated document. Mr. Singla seeks to urge that the petitioner has fabricated anti-dated documents with a malafide intention to make a false claim for appointment of an Arbitrator to keep the litigation on

with regard to a transaction under the Agreement to Sell dated 10.11.2003 that came to an end on petitioner's encashing the cheque of Rs. 5,40,000/- sent by the respondent towards refund of the advance/earnest money.

8 On the other hand, Mr. Sharma, learned senior counsel appearing on behalf of the petitioner had relied upon a letter written by the petitioner to the respondent on 05.10.2004 (Annexure 'A' to the reply of the petitioner to IA No. 6514/2004 in OMP No. 279/2004) and on the strength of the said letter, he had argued that the respondent himself had deposited the cheque of Rs. 5,40,000/- in the account of the petitioner without any intimation or taking the consent of the petitioner. It was submitted that the said cheque was deposited by the respondent in the account of the petitioner to defeat the present proceedings. Mr. Sharma had urged that the respondent cannot be allowed to take advantage of deposit of Rs. 5,40,000/- made by him in the account of the petitioner without his consent or any intimation in this regard. According to the learned senior counsel for the petitioner disputes and differences have arisen between the parties under the Agreement to Sell dated 10.11.2003 and the same are required to be referred for arbitration in terms of Arbitration Agreement

between the parties. He, therefore, requested for appointment of an independent arbitration by this Court.

9 I have given my thoughtful consideration to the rival arguments advanced by the learned counsel for the parties.

10 The first contention of the respondent in opposition to these petitions is on the point of locus standi of the petitioner to file the said petitions. The plea of the respondent is that the Agreement to Sell dated 10.11.2003 which is the basis of these petitions was executed between the respondent and Mr. Santosh Kumar, Chairman and Director of the petitioner company in his individual capacity. To show the same, Mr. Singla had referred to the first and the last page of the Agreement in question where the vendee party has been described as Mr. Santosh Kumar, Chairman and Director of the petitioner company and on the last page the name of only Mr. Santosh Kumar finds mention as 'vendee' under the Agreement. Mr. Singla had relied upon Section 46(1)(a) of the Companies Act, 1956 in support of his argument that a contract on behalf of the company can be made on behalf of the company only by any person acting under its authority, express or implied. The contention was that in the present case the Agreement to Sell was made by Mr. Santosh Kumar not on

behalf of the company under its authority but in his individual capacity. To counter this argument, Mr. Sharma learned senior counsel for the petitioner had referred to a letter dated 08.11.2003 (Annexure P-2 to AA No. 67/2005) addressed to the respondent written on the letter head of the petitioner company and signed by its Chairman Mr. Santosh Kumar in relation to a transaction mentioned in the Agreement to Sell dated 10.11.2003. With the help of the said letter dated 08.11.2003, Mr. Sharma had argued that the Agreement to Sell was in fact entered into between the respondent and the petitioner company and not by Mr. Santosh Kumar in his individual capacity. The petitioner has filed the true copy of the extract of the relevant entries of its Account No. 37292 with Indian Overseas Bank, Yusuf Sarai Branch, New Delhi to show that the cheque of Rs. 5,40,000/- towards advance/earnest money was given by the petitioner company and not by Mr. Santosh Kumar from his personal account. From the letter dated 08.11.2003 and also the copy of the bank statement referred above, it appears that the transaction contained in the Agreement to Sell dated 10.11.2003 was between the respondent and the petitioner company and not with Mr. Santosh Kumar in his personal capacity as contended on behalf

of the respondent. I do not find any substance in the contention of the respondent that the petitioner has no locus standi to file these petitions.

11 The next argument of the respondent was that no arbitrable dispute is left between the parties requiring appointment of an Arbitrator. The contention of the respondent was that since the petitioner had committed breach of the terms and conditions of the Agreement to Sell dated 10.11.2003, though the respondent could have forfeited the earnest money paid by the petitioner but in all fairness, the respondent has returned the advance/earnest money of Rs. 5,40,000/- to the petitioner by means of an account payee cheque vide covering letter dated 16.08.2004 and that the said cheque has been encashed by the petitioner on 02.09.2004 without any protest. It was submitted that since the petitioner had accepted the refund of advance/earnest money, Agreement in question came to an end and does not leave any dispute require to be arbitrated. The learned senior counsel for the petitioner in reply to the above argument of the respondent's counsel relied upon a letter dated 05.10.2004 written by the petitioner to the respondent informing him that the cheque of Rs. 5,40,000/- was deposited by the respondent

himself in the account of the petitioner without his knowledge or consent and therefore according to the petitioner the respondent cannot be allowed to take advantage of the said refund. The learned counsel had further contended that the petitioner had sent back the cheque of Rs. 5,40,000/- to the respondent along with his letter dated 05.10.2004. Mr. Singla appearing on behalf of the respondent had vehemently argued that the letter dated 05.10.2004 referred above and relied upon by the petitioner's counsel is a fabricated document and in support of his argument, he relied upon an endorsement of Speed Post contained at the bottom of the said letter dated 05.10.2004 to show that the said letter was dispatched by the petitioner on 15.10.2004 and was received by the respondent on next day in the afternoon of 16.10.2004. It was submitted that the respondent had immediately replied the aforementioned letter of the petitioner dated 05.10.2004 through his reply dated 17.10.2004 denying receipt of the cheque alleged to had been enclosed by the petitioner with its letter dated 05.10.2004. The respondent had further shown that the contention of the petitioner that the cheque of Rs. 5,40,000/- was deposited by the respondent himself in the account of the petitioner is incorrect on its face in view of the

fact that the respondent had sent the cheque of refund amount to the petitioner along with a covering letter dated 16.08.2004. The respondent has filed a certificate from Speed Post Centre, New Delhi to show delivery of his letter dated 16.08.2004 upon the petitioner on 19.08.2004. The respondent has also filed on record a certificate from his bank to show that a cheque of Rs. 5,40,000/- sent by him to the petitioner has been credited to the account of the petitioner on 02.09.2004. These documents clearly establish that the petitioner had accepted the refund of earnest money sent by the respondent to it without any protest or demur in this regard and thereby the petitioner had closed the transaction of sale-purchase contained in the Agreement to Sell dated 10.11.2003. This Court is of the view that when the main transaction between the parties had come to an end, the question of arbitrating any dispute thereunder would not arise. It shall further be relevant to mention that in petition under Section 9 of the Arbitration and Conciliation Act, 1996 (OMP No. 279/2004), this Court vide its letter dated 25.10.2004 had directed the petitioner to deposit Rs. 25 lacs towards part balance sale consideration. The petitioner could not make the said deposit within the time period granted by the Court and on his request the time for deposit was extended but still when

the petitioner deposited Rs. 25 lacs pursuant to the Court orders, the cheque of the said amount deposited by the petitioner was returned unpaid with remarks 'insufficient fund'. This further shows that the petitioner was not interested in continuing with the transaction contained in the Agreement to Sell dated 10.11.2003 and had treated the said transaction closed for all intents and purposes.

12 Mr. Singla appearing on behalf of the respondent had argued that the petition under Section 11 even otherwise cannot be allowed because the mandatory notice invoking the Arbitration Agreement before filing of the said petition was not served by the petitioner upon the respondent. The notice dated 16.08.2004 alleged to had been sent by the petitioner to the respondent was purportedly sent through courier. There is visible interpolation of date of dispatch mentioned in the courier receipt filed on record to show dispatch of notice dated 16.08.2004. It may be noted that the petitioner had filed its petition under Section 9 on or around 23.08.2004 and in the said petition the petitioner has pleaded that it is also taking the requisite steps for appointment of arbitrators for resolving the disputes between the parties. The notice dated 16.08.2004 was allegedly sent by the petitioner to the respondent before filing

of the petition under Section 9. There is not even a whisper in the said petition about sending of the said notice. In case the petitioner had sent the notice dated 16.08.2004 before filing of the petition under Section 9 then this fact must have found mention in the said petition. Non-disclosure of notice dated 16.08.2004 in petition under Section 9 shows manipulation on the part of the petitioner. As per the petitioner the notice invoking the Arbitration Agreement was sent by it to the respondent through courier. The receipt of courier placed on record cannot be acted upon because there is visible interpolation of date in the same. Moreover, no document or proof has been filed to show the delivery of notice invoking the Arbitration Agreement on the respondent. Hence the petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 cannot be allowed for want of service of notice invoking the Arbitration Agreement as well. The petition under Section 9 became infructuous because of non-compliance of the condition of deposit of Rs. 25 lacs imposed by the Court vide order dated 25.10.2004.

13 In view of the above, these petitions are devoid of any merit and are therefore dismissed leaving the parties to bear their own costs.

October 09, 2007 **S.N. AGGARWAL**
a **(JUDGE)**